No. 7773

In the United States Circuit Court of Appeals for the Ninth Circuit

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CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

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SUPPLEMENTAL BRIEF OF APPELLEE.

JOHN P. GRAY,
A. J. G. PRIEST,
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Attorneys for Appellee.

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SUPPLEMENTAL BRIEF OF APPELLEE.

There are a few matters which counsel for appellee desire to call to the attention of the court in this supplemental brief.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE INTERLOCUTORY INJUNCTION:

We desire to call the court's attention to the decision in *Wilshire Oil Co. v. United States,* decided April 29, 1935. It would seem that the language of the Supreme Court in that case is applicable to the case at bar.

PLAINTIFF'S RIGHT TO MAINTAIN THE SUIT:

In addition to the authorities which are set forth in the brief, there is the recent decision of the District Court of the United States for the Western District of South Carolina in *Duke Power Co. and Southern Public Utilities Co. v. Greenwood County et al and Harold L. Ickes, as Federal Emergency Administrator of Public Works,* a copy of the opinion in which case was handed to the Clerk.

That case sustains the right of the plaintiff to maintain such an action as the one involved in this cause. The decision of the court follows *Frost v. Corp. Com. of Oklahoma,* 278 U. S. 515, and cites in support of the conclusion, *Gallardo v. Porto Rico Ry. L. & P. Co.* 18 Fed. (2) 918; *City of Campbell, Mo. v. Arkansas-Missouri Power Co.* 55 Fed. (2) 560, 562; *Iowa Southern Utilities Co. v. Cassill,* 69 Fed. (2) 703, 704; *Oklahoma Utilities Co. v. City of Hominy,* 2 Fed. Supp. 849; *Missouri Public Service Co. v. City of Concordia,* 8 Fed. Supp. 1, 4; *Princeton Power Co. v. Calloway,* 128 S. E. 89; *Puget Sound Traction, etc., Co. v. Grassmeyer,* 102 Wash. 482, 173, Pac. 504, L. R. A. 1918-F, 469, 474.

CONSTITUTIONALITY OF TITLE II OF NATIONAL INDUSTRIAL RECOVERY ACT.

The case of *Duke Power Co., etc. v. Greenwood County et al and Harold L. Ickes* above referred to, also passes upon the constitutionality of Title II of the National Industrial Recovery Act as the same provides for the establishment of the Public Works Administration and as applicable to the loan and grant of moneys for the purpose of constructing a competing electric system—the same question which is involved in this case.

The court holds that that power in the general government is not to be found either in the Commerce Clause or the General Welfare Clause.

The court in its conclusion says:

> "It is enough to say that the Act here questioned, as applied to the facts of this case, extends the taxation and appropriating powers of Congress to an extent heretofore undreamed of, and that, in our judgment, the right to challenge has not been lost by previous acquiescence in any governmental policy. That many of the provisions of the Act in question are constitutional is not here, and cannot be successfully, questioned. The power of Congress in its discretion to provide any unlimited amount, however extravagant, for the construction of necessary or proper public buildings, to support the army and navy, to provide for post offices and post roads, to exercise control over interstate commerce, to appropriate whatever funds it may find advisable therefor, and to tax for the maintenance of its governmental activities generally, even though the purpose of the act be largely to relieve unemployment and to increase the spending power of the people, is not subject to review. So long as Congress legislates within the delegated powers outlined in the Constitution, neither its power nor discretion may be reviewed by the courts. We think it pertinent here to remark that the field and the need for public appropriations have not yet been fully covered. The recognized lack of public buildings at Anderson and Greenwood furnishes apt illustration."

The case supports the position of appellee.

TITLE II, SECTIONS 201, 202 AND 203 OF THE NATIONAL INDUSTRIAL RECOVERY ACT DOES NOT AUTHORIZE THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS TO MAKE THE LOAN AND GRANT TO THE CITY OF COEUR D'ALENE:

In our original brief, pages 95 and 96, we called attention to the fact that in the Senate by an amendment proposed by Senator Norris, it was proposed to enlarge the provisions of Section 202, sub-division (b) by adding after the word "transmission" the words "generating and distribution" so that subdivision (b) would read:

> "(b) Conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission, *generation and distribution* of electrical energy, and construction of river and harbor improvements and flood control, etc."

Reference is made to the 77th Congressional Record, page 5620. This reference is to the report of the Conference Committee showing that the amendment (Senate Amendment No. 44) was rejected. It was first offered by Mr. Norris on page 5309 of the Congressional Record. The discussion of the report of the Conference Committee on this amendment is found at pages 5853 and 5854 of the Congressional Record. The report of the conferees was adopted and the amendment of Senator Norris was eliminated (p. 5861).

The opinions expressed by senators upon the floor in seeking to secure the adoption of the conference report are not appropriate sources of information upon which to determine the meaning of a statute.

However, this debate shows that the precise questions were raised there by Senator Norris and conferees of the House would not consent to the insertion of the Norris amendment.

We are forwarding to the Clerk for the convenience of the court photostatic copies of the pages of the Congressional Record referred to so that if it is not at hand the court can examine the photostatic copy.

QUESTIONS ASKED BY THE COURT IN THE ARGUMENT:

The presiding Judge asked counsel for appellee during the argument what items of cost or expenses were taken into consideration in the figures shown on page 9 of appellee's brief and in paragraph XIII of the complaint setting forth the average rate per kilowatt hour charged by appellee in the City of Coeur d'Alene, and the rate which the city would have to secure under the set-up of the engineer employed by the city. The answer to the questions was not complete and not again referred to in the argument. The allegations are found in paragraph XIII of the complaint.

The Rate Received by Plaintiff:

The rate received by plaintiff is the actual rate, namely 3.33c per kilowatt hour, exclusive of the power used for pumping.

The Rate Necessary for the City:

This is alleged to be an average cost to the consumer of 3.43c per kilowatt hour, exclusive of power used for water pumping. It is based upon the assumptions in the report of the engineer for the city and upon the estimated average rate which would be necessary to make the city system self-liquidating and permit it to carry its costs. This includes the cost of production, interest and a sinking fund to take care of the principal without any account for taxes or depreciation. It is further based upon the assumption that the municipal plant would secure 80% of the gross consumption, which plaintiff alleges it would be unable to secure. It is also based upon the assumption of the city engineer that the plant proposed by him would be adequate to supply 80% of the load, which again the plaintiff denies. It also involved the assumption of the engineer for the city that fuel oil could be secured for 6c per gallon, whereas the cost actually at the time the complaint was filed was 6.91c and may well go higher. This feature of the case is more fully set forth in the affidavit of Richard McKay in support of the application for the interlocutory injunction found at pages 128 to 133 of the record.

In some respects, the answers of counsel for appellee to the presiding judge with reference to these figures were inaccurate, and this statement is intended not only as a statement of the allegations of the complaint and the contents of the affidavit

in support of the application, but as a correction of any such statements made in oral argument.

THE IDAHO CONSTITUTION:

In the reply brief filed on behalf of Harold L. Ickes, counsel for Mr. Ickes undertakes to adopt the same argument which was advanced by counsel for the city where on page 4 of the typewritten brief it is said:

> "It would seem that an indebtedness or liability declared void by the Constitution (referring to the Constitution of Idaho) could not be the subject matter of a judgment against the City of Coeur d'Alene by the government or other party"

and cites Missouri Utilities Co. v. City of California in support of his position.

It is enough to call the attention of this court to the fact that the Supreme Court of Idaho has regarded an injunction restraining the issuance of illegal and unconstitutional obligations as an appropriate remedy. *Feil v. City of Coeur d'Alene,* 23 Id. 32-49; *Straughan v. City of Coeur d'Alene,* 53 Ida. 494. The same argument was advanced here as was advanced in the Supreme Court of Idaho in *Feil v. City of Coeur d'Alene.* In the course of the opinion in answering that the court says:

> "But it is said that the city is not going to pay for it; that somebody else is going to pay for it. If the city has any right to obligate *anyone other than the city* to pay for this water system, then the contention made that there is

> no city obligation may be true. But when we turn to the constitution, we find that it does not merely prohibit the city from incurring any *municipal* indebtedness or liability, but it prohibits it incurring *any* indebtedness or liability. Now, if the city has the power to obligate the water consumers to pay for this system or to obligate any specific property to pay for it, or any particular class of citizens to pay for it, then it is prohibited as much by Sec. 3, Art. 8, of the Constitution from *incurring such indebtedness or liability* as if it were a *city* indebtedness or liability, because the constitution says it 'shall not incur any indebtedness or liability' exceeding a certain limitation without at the same time levying an annual tax to meet such obligation and submitting the question to a vote of the people."

The above case of *Feil v. City of Coeur d'Alene* settles the question so far as the Idaho Constitution is concerned. Referring to that case, we call attention to the fact that the court there held that it is clearly the law that the city is subject to the same rules and regulations under the constitution and statute fixing reasonable rates as are individuals and private corporations.

ADDITIONAL AUTHORITY.

We desire to add to the citation of *Ely v. Northern Pacific Ry. Co.,* 197 U. S. 1, which is found at page 113 of our original brief, the later case of *Gallardo v. Smallwood,* 275 U. S. 56.

ERROR IN CITATION IN THE ORIGINAL BRIEF.

On page 45 of the original brief of appellee there is cited the case of *Guadeloupe v. Porto Rico Light & Power Co.* This was an error in printing. The case is *Gallardo v. Porto Rico Light and Power Co.*, 18 Fed. (2d) 918.

Respectfully submitted,

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